

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:

Petition Filed by the National Association of  
Broadcasters Regarding Programming Carried  
by Satellite Digital Audio Radio Services

Docket No. MB 04-160

**Opposition of Sirius Satellite Radio Inc.  
and XM Radio Inc.**

**Sirius Satellite Radio Inc.**

Patrick L. Donnelly  
Executive Vice President, General Counsel  
and Secretary  
Sirius Satellite Radio Inc.  
1221 Avenue of the Americas  
New York, NY 10020  
(212) 584-5100

**XM Radio Inc.**

Lon Levin  
Senior Vice President, Regulatory  
XM Radio Inc.  
1500 Eckington Place, NE  
Washington, DC 20002  
(202) 380-4000

Dated: June 4, 2004

## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION AND SUMMARY .....	1
II. BACKGROUND .....	2
III. THE COMMISSION SHOULD DENY THE NAB PETITION.....	3
A. Satellite DARS Traffic and Weather Alerts Do Not Constitute a Controversy or Uncertainty.....	4
B. Satellite DARS Traffic and Weather Alerts Serve the Public Interest .....	6
C. Satellite DARS Poses No Economic Threat to Terrestrial Radio Service.....	8
D. The First Amendment Protects the Rights of Satellite Radio Licensees to Broadcast Traffic and Weather Alerts and the Rights of Listeners to Receive These Alerts .....	13
E. Modifying Satellite DARS Licenses Requires a Section 316 Hearing.....	15
IV. CONCLUSION.....	16

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of:

Petition Filed by the National Association of  
Broadcasters Regarding Programming Carried  
by Satellite Digital Audio Radio Services

Docket No. MB 04-160

**Opposition of Sirius Satellite Radio Inc.  
and XM Radio Inc.**

Sirius Satellite Radio Inc. (“Sirius”) and XM Radio Inc. (“XM”) (collectively “Satellite Radio Licensees”) hereby oppose the National Association of Broadcasters Petition (“NAB Petition”) requesting a Declaratory Ruling that would prohibit satellite digital audio radio service (“satellite DARS”) providers from alerting subscribers of traffic and weather conditions.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The Federal Communications Commission (“FCC” or “Commission”) should deny the NAB Petition because no controversy or uncertainty exists. Both Sirius and XM already have consented to NAB’s demand and do not insert local content at satellite DARS repeaters. Moreover, the provision of traffic and weather alerts by XM and Sirius is consistent with public expectations of radio services. Even if not components of “radio,” traffic and weather reports are permissible ancillary uses of the band allocated to satellite DARS. More importantly, these

---

<sup>1</sup> See *Media Bureau Action Request for Comment on Petition Filed by The National Association of Broadcasters Regarding Programming Carried by Satellite Digital Audio Radio Services*, DA 04-1096 (Apr. 27, 2004) (Public Notice).

alerts (1) unquestionably serve the public interest; (2) pose no economic threat to terrestrial radio service; and (3) remain protected by the First Amendment rights of both the satellite DARS licensees and the listening public. Furthermore, even if the Commission were inclined to ban such broadcasts, a hearing under section 316 of the Communications Act of 1934, as amended (“the Communications Act”), would be required to impose this condition on the existing satellite DARS licenses. The Commission should therefore reject the NAB’s Petition and reaffirm that a commitment to flexible regulation of satellite DARS is in the best interest of Americans.

## **II. BACKGROUND**

As winning bidders in a 1997 government auction of S-band spectrum, XM and Sirius are the only U.S.-licensed providers of satellite radio services. Each company uses 12.5 MHz in the 2320-2345 MHz band to offer music, news, sports, and entertainment programming. Both companies operate a subscription-based service, and Sirius and XM collectively reach more than two million subscribers.

On January 22, 2004, several FCC staff members, including representatives the Mass Media Bureau, were briefed on satellite DARS traffic and weather alerts. FCC staff learned that, in response to customer demand, alerts regarding regional traffic and weather conditions were supplementing music and talk show programming. The alerts provide urgent traffic and weather updates to subscribers. Since the alerts are broadcast nationally, each subscriber receives every alert. Subscribers, however, may select channels that broadcast information for their particular regions of interest.<sup>2</sup> In this way, satellite DARS provides traffic and weather updates that keep listeners safe and informed, especially in times of emergency. These alerts represent an

---

<sup>2</sup> The traffic and weather alerts use only a small fraction of the allocated bandwidth. For example, traffic and weather channels on the Sirius network occupy only 160 kbps – 180 kbps, requiring no more than 4 percent of Sirius’ total system capacity.

improvement in America's public safety network: traffic and weather updates reach more listeners more quickly.

On April 14, 2004, the NAB requested the instant Declaratory Ruling. The NAB Petition asks the Commission to prohibit satellite DARS licensees from (1) using technology to deliver content that varies from one receiver to another; and (2) providing locally oriented services on nationally distributed channels.

### **III. THE COMMISSION SHOULD DENY THE NAB PETITION**

The Commission should deny the NAB Petition because the Satellite Radio Licensees' provision of traffic and weather alerts presents no controversy or uncertainty that would warrant a declaratory ruling. As explained below, this programming offering violates neither their license nor any FCC regulation. Even more important, these weather and traffic alerts serve the public interest by keeping listeners informed and safe. The NAB Petition, by contrast, attempts to thwart competition and limit the availability of safety information, even though satellite DARS poses no economic threat to terrestrial radio service. Finally, the First Amendment protects XM and Sirius' right to broadcast such information and listeners' rights to receive the alerts. Therefore, in the absence of controversy and uncertainty, and in the interests of the listening public, the Commission should decline the NAB's request to ban traffic and weather alerts by satellite DARS licensees.

**A. Satellite DARS Traffic and Weather Alerts Do Not Constitute a Controversy or Uncertainty.**

Congress has empowered the Commission “in its sound discretion [to] issue a declaratory order to terminate a controversy or remove uncertainty.”<sup>3</sup> Where no such controversy or uncertainty exists, the Commission must use its “broad power to refuse to grant declaratory relief.”<sup>4</sup> Indeed, the Court of Appeals for the D.C. Circuit has cautioned that the Commission is not “compelled to issue a clarifying statement unless its failure to do so can be shown to be a clear abuse of discretion.”<sup>5</sup>

It is clearly within the discretion of the Commission to issue a Declaratory Order on a licensee’s proposal. It is equally clear, however, that the Commission is not *required* to issue such a declaratory statement merely because a broadcaster asks for one.<sup>6</sup>

Thus, where—as here—no real controversy or uncertainty exists, the Commission need *not* issue a declaratory ruling.

No controversy or uncertainty exists here because Sirius and XM already meet one element of NAB’s requested relief. NAB asks the Commission to stop satellite DARS from varying its content by the location of its receivers. Yet, XM and Sirius transmit *nationwide*, meaning that content never varies by the location of a receiver. Each channel offers *identical content to all locations*, and every Sirius and XM subscriber is capable of receiving every

---

<sup>3</sup> 5 U.S.C. § 554 (Supp. IV 2004). *See also* 47 C.F.R. § 1.2 (2003); *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 916 (5th Cir. 1993).

<sup>4</sup> *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 747 (D.C. Cir. 1986).

<sup>5</sup> *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973).

<sup>6</sup> *Id.* (citation omitted).

channel. Therefore, XM and Sirius already comply with NAB's requested relief, and no declaratory ruling is required.<sup>7</sup>

NAB's second request also evokes no controversy or uncertainty, because traffic and weather alerts are a crucial and long accepted component of radio services. Terrestrial radio already provides both weather and traffic. The provision of traffic and weather alerts by Sirius and XM exemplify "radio" (whether terrestrial or satellite, broadcast or subscription), consistent with the allocation and the Commission's intent. Subscribers requested traffic and weather bulletins, and XM and Sirius responded, meeting the public's needs.<sup>8</sup>

Even if the service provided by Sirius and XM is not considered "radio," traffic and weather alerts certainly qualify as lawful *ancillary* uses of the satellite DARS band.<sup>9</sup> As early as when it allocated S-band spectrum for satellite DARS systems, the FCC acknowledged that

---

<sup>7</sup> Furthermore, both Satellite Radio Licensees already agreed not to inject new content at their terrestrial repeaters. Accordingly, no controversy or uncertainty exists, and no declaratory order is necessary.

<sup>8</sup> This is confirmed by the over 23,000 letters from satellite radio customers filed in opposition to NAB's Petition. *See, e.g.*, Comment of Michael McClure, MB Docket No. 04-160 (June 3, 2004) ("The traffic and weather that XM offers allows me to get up-to-date information all of the time."); Comment of Jeff Harris, MB Docket No. 04-160 (June 3, 2004) ("When I travel, I use my satellite radio. It is very helpful to be able to check on driving conditions in a city I'm approaching."); Comment of Dawn Campbell, MB Docket No. 04-160 (June 3, 2004) ("I am writing to support XM Radio travel and weather channel. I do a lot of traveling and it is a great help. My husband is a truck driver and travels all over the USA and it is a great help to him.").

<sup>9</sup> Although neither satellite DARS license specifically mentions traffic and weather information, the Commission clearly anticipated ancillary uses of the band when it proposed and issued the licenses. *See* 47 CFR § 25.144 (2003); *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Notice of Proposed Rulemaking, 11 FCC Rcd 1, 26-27 (1995) (seeking comments on limits of ancillary uses) ("*Notice of Proposed Rulemaking*"); *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5793 (1997) (advocating flexibility for ancillary uses) ("*Satellite DARS Report and Order*").

“[a]ncillary uses of allocated bands are legally permissible.”<sup>10</sup> Thereafter, in its 1997 *Report and Order*, the Commission confirmed the lawfulness of ancillary uses of the DARS band:

The applicants have proposed a mix of ancillary services. We agree with the commenters who argue that allowing flexibility consistent with the allocation will allow providers to tailor service offerings to meet consumer needs.<sup>11</sup>

The agency further explained that its policy of flexibility would permit satellite DARS licensees to offer channels dedicated to broadcasting safety and emergency information.<sup>12</sup>

Whether considered part of “radio,” or as a permitted ancillary use of allocated spectrum, Satellite Radio Licensees may lawfully transmit traffic and weather alerts pursuant to their existing licenses. Accordingly, the FCC should dismiss or deny NAB’s request.

**B. Satellite DARS Traffic and Weather Alerts Serve the Public Interest.**

Congress created the Commission “for the purpose of promoting safety of life and property through the use of wire and radio communications.”<sup>13</sup> Toward this end, the Commission must “generally encourage the larger and more effective use of radio in the public interest.”<sup>14</sup>

---

<sup>10</sup> *Notice of Proposed Rulemaking*, 11 FCC Rcd at 10.

<sup>11</sup> *See Satellite DARS Report and Order*, 12 FCC Rcd at 5793. *See also Satellite DARS Report and Order*, 12 FCC Rcd at 5788-89 (concluding that satellite DARS licensees “should be able to tailor their services to meet customer needs....Flexibility for licensees to meet market demands is crucial”). The sole relevant constraint on satellite DARS ancillary services is that they remain “ancillary,” *i.e.*, occupy less than half the licensed bandwidth. The combined spectrum employed for traffic and weather information easily satisfies that criteria. *See supra* note 2.

<sup>12</sup> *See Satellite DARS Report and Order*, 12 FCC Rcd at 5793 (favorably mentioning comments of USDA/Forest Service National Weather Program, which suggested transmitting forest fire and other emergency information).

<sup>13</sup> 47 U.S.C. § 151 (Supp. IV 2004).

<sup>14</sup> 47 U.S.C. § 303(g) (Supp. IV 2004).



Traffic and weather transmissions by satellite DARS licensees perfectly fit these criteria. Traffic and weather updates promote public safety by keeping listeners aware of current conditions, especially in emergency situations. Federal Emergency Management Agency (FEMA) Director James Lee Witt noted the importance of disseminating emergency information using radio: “Communities rely on broadcasters in times of crises.”<sup>15</sup> Even NAB repeatedly has emphasized the importance of weather and/or traffic information, especially during emergencies:

- [R]adio’s role in keeping people informed and connected during their daily lives is stronger than ever. From traffic reports and sporting events, to natural disasters and up-to-the-minute world affairs, radio is at the forefront of bringing listeners vital information.<sup>16</sup>
- [W]e are in a unique position to help educate individuals on what they can do to ensure that a disaster doesn’t destroy their community....[W]e not only educate our listeners and viewers, but we also make our communities safer and better places to live.<sup>17</sup>
- [Radio licensees] are the eyes, ears, and voice to communities during times of disaster. [They] serve as the lifeline to the public in times of need. We are proud to be a part of our nation’s early weather-warning system.<sup>18</sup>

Given the recognized importance of widely disseminating weather reports during emergencies, the Commission should reject the NAB’s attempt to restrict this information. Just like traditional radio broadcasting, satellite DARS listeners need information on tie-ups and tornados. No reason exists why America’s weather- or traffic-warning systems should be

---

<sup>15</sup> NAB, *NAB Announces Disaster Preparedness and Relief Effort*, Aug. 7, 1998, at <http://www.nab.org/newsroom/PressRel/Releases3798.asp> (last visited May 21, 2004).

<sup>16</sup> NAB, *Radio Reigns* (Dec. 19, 2003) at <http://www.nab.org/Newsroom/PressRel/Releases/RadioWrapUp122903.htm> (last visited May 21, 2004) (quoting NAB President Edward Fritts).

<sup>17</sup> NAB, *NAB and FEMA Release New Project Impact Disaster Prevention PSA*, June 15, 2000, at <http://www.nab.org/Newsroom/pressrel/Releases/4200.asp> (last visited May 21, 2004) (quoting NAB President Edward Fritts).

<sup>18</sup> NAB, *NAB Announces Disaster Preparedness and Relief Effort*, Aug. 7, 1998, at <http://www.nab.org/Newsroom/pressrel/Releases/3798.asp> (last visited May 21, 2004) (quoting NAB President Edward Fritts).

confined to terrestrial radio. Simply put, the more sources of traffic and weather information, the better for everyone.

Moreover, satellite DARS can prospectively reach communities with little or no terrestrial radio-delivered traffic, weather or similar emergency information. In 1997, the Commission recognized that satellite DARS “will particularly benefit communities where terrestrial broadcast service is less abundant.”<sup>19</sup> Adding weather and traffic alerts only augments the public interest inherent in satellite DARS:

[S]atellite DARS can provide new services that local radio inherently cannot provide. With its national reach, satellite DARS could provide continuous radio service to the long-distance motoring public, persons living in remote areas, and may offer new forms of emergency services.<sup>20</sup>

Traffic and weather alerts exemplify those “new forms of emergency services.” In just a few years, satellite DARS has broadened America’s radio audience, serving more people in more places, with more programming diversity, than NAB’s member stations have accomplished over seven decades. As NAB elsewhere acknowledges, radio weather and traffic alerts serve the public interest. Consistent with its statutory mandate to promote the “larger and more effective use of radio in the public interest,” the FCC should dismiss the NAB petition.

### **C. Satellite DARS Poses No Economic Threat to Terrestrial Radio Service.**

The NAB petition suggests that satellite DARS traffic and weather programming will undermine the viability of local radio. As a threshold matter, the economic impact of these services on existing licensees—the so-called *Carroll* doctrine<sup>21</sup>—is no longer legally cognizable.

---

<sup>19</sup> *Satellite DARS Report & Order*, 12 FCC Rcd at 5760.

<sup>20</sup> *Id.* at 5760-61.

<sup>21</sup> *See Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

The Commission eliminated the *Carroll* doctrine in 1988, recognizing that the former policy provided “existing licensees with an anticompetitive tool to delay the entry of new stations.”<sup>22</sup> Given that its petition candidly seeks economic protectionism, the NAB must be late—a decade-and-a-half late—getting the news. In keeping with its commitment to competition, the Commission should dismiss the NAB Petition without considering any alleged economic impact on terrestrial radio.

Even if economic impact were relevant, the Commission should not—as the NAB Petition requests—provide extraordinary protection to radio broadcasters. Neither NAB, nor its members, has any “right” to cement a historical hegemony over traffic and weather reports. Rather, the Communications Act “does not entrench any particular system of broadcasting: existing systems, like existing licensees, have no entitlement that permits them to deflect competitive pressure from innovative and effective technology.”<sup>23</sup> Satellite DARS transmission of traffic and weather alerts is an innovative response to consumer demand and effective safety measure. Indeed, the Commission already declined to require similar protections for terrestrial radio service, declaring: “[W]e reject the suggestion that we must protect one service at the expense of an entirely new technology.”<sup>24</sup> As it did in 1995, the Commission should rebuff this attempt to insulate terrestrial radio service from competition with an “innovative and an effective technology.”

---

<sup>22</sup> *Policies Regarding the Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, Report and Order, 3 FCC Rcd 638, 640 (1988) (“Detrimental Effects Report and Order”).

<sup>23</sup> *Nat’l Ass’n of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

<sup>24</sup> *Amendment of the Commission’s Rules with Regard to the Establishment and Regulations of New Digital Audio Radio Services*, Report and Order, 10 FCC Rcd 2310, 2314 (1995).

In any event, NAB's assertion that satellite radio traffic or weather might "severely impact" terrestrial radio<sup>25</sup> is both fanciful and unsupported. As the FCC recently catalogued, more than 11,000 terrestrial radio stations reach nearly 800 million radios in the United States.<sup>26</sup> Satellite radio, by comparison, currently serves about 2 million subscribers, not even 1% of the total radio audience.<sup>27</sup> In short, terrestrial radio service dwarfs satellite radio. Providing traffic or weather alerts to some additional listeners could not possibly injure the terrestrial radio industry. The sheer magnitude and ubiquity of terrestrial radio ensures that satellite DARS traffic and weather pose no economic threat to radio broadcasters.

In overstating the impact of satellite DARS, the NAB resorts to bad-mouthing its own members, emphasizing the supposed "fragility of local radio service."<sup>28</sup> This portrayal is outdated and undermined by NAB and radio experts themselves. Indeed, NAB supplies no data addressing today's terrestrial radio market. Instead, the NAB Petition relies on the same 1995 studies it submitted in opposition the initial satellite DARS licensing.<sup>29</sup> Yet, the Commission already rejected NAB's data, in its 1997 *Report and Order*, concluding that satellite DARS would not threaten local radio service.<sup>30</sup> NAB's repetitious and already-rejected arguments fall well short of demonstrating any uncertainty or controversy.

---

<sup>25</sup> See NAB Petition for Declaratory Ruling, at 8.

<sup>26</sup> *Digital Audio Broadcasting Systems And Their Impact On The Terrestrial Radio Broadcast Service*, Further Notice of Proposed Rulemaking and Notice of Inquiry, FCC 04-99, MM Docket No. 99-325, ¶¶ 10-11 (Apr. 20, 2004).

<sup>27</sup> *Id.*, ¶ 12.

<sup>28</sup> See NAB Petition, at 8.

<sup>29</sup> The Commission dismissed one of these studies as "likely overestim[ing] the potential impact of satellite DARS on terrestrial stations profitability." *Satellite DARS Report and Order*, 12 FCC Rcd at 5766.

<sup>30</sup> *Satellite DARS Report and Order*, 12 FCC Rcd at 5766-68.

Recent economic data depict a healthy and growing terrestrial radio advertising market despite the advent of satellite radio. For example, terrestrial radio revenues grew 6 percent in 2002<sup>31</sup> and another 1 percent in 2003.<sup>32</sup> This year is looking even better: March 2004 advertising revenue was 10 percent greater than a year ago,<sup>33</sup> while local revenue increased by 4 percent in April.<sup>34</sup> Analysts predict 2004 advertising revenue will grow between 4 percent and 8 percent, a clear sign local radio is healthy.<sup>35</sup>

In fact, when not before the Commission, NAB touts terrestrial radio's success, undermining assertions in its Petition:

- "By all accounts radio is alive and well."<sup>36</sup>
- "2003 has been a banner year for radio."<sup>37</sup>
- "Radio is running with the bulls." Radio industry business plans are "boundless."<sup>38</sup>

---

<sup>31</sup> Radio Ink, *Radio Revenue*, Jan. 31, 2002) at <http://www.radioink.com/listingsEntry.asp?ID=82935&PT=radioincome> (last visited May 21, 2004).

<sup>32</sup> Radio Advertising Bureau (RAB), *Radio Wraps Up 2003 With Ad Sales Slightly Ahead of Last Year*, Feb. 2, 2004, at [http://www.rab.com/pr/revenue\\_detail.cfm?id=36](http://www.rab.com/pr/revenue_detail.cfm?id=36) (last visited May 21, 2004).

<sup>33</sup> Radio Advertising Bureau (RAB), *Radio Revenue Rebounds with Double-Digit Growth in March; 1<sup>st</sup> Quarter Also Yields Positive Results*, Apr. 23, 2004, at [http://www.rab.com/pr/revenue\\_detail.cfm?id=39](http://www.rab.com/pr/revenue_detail.cfm?id=39) (last visited May 21, 2004).

<sup>34</sup> *RAB Confirms – April Was Darn Good*, Inside Radio (Tom Taylor), May 28, 2004, at 1.

<sup>35</sup> Janet Stilson, *Radio Scraps for Its Ad Share*, Advertising Age (Feb. 2, 2004), 22.

<sup>36</sup> NAB, *Opening Remarks of Edward O. Fritts on The 2002 NAB Radio Show* (Sept. 13, 2002) at <http://www.nab.org/Newsroom/PressRel/Speeches/0902.htm> (last visited April 27, 2004).

<sup>37</sup> NAB, *Radio Reigns*, Dec. 19, 2003, quoting Edward Fritts at <http://www.nab.org/Newsroom/PressRel/Releases/RadioWrapUp122903.htm> (last visited May 21, 2004).

<sup>38</sup> *NAB Radio Show Notebook* Sept. 6, 1999, quoting Edward Fritts at [http://www.findarticles.com/cf\\_dls/m3169/36\\_39/55696600/print.jhtml](http://www.findarticles.com/cf_dls/m3169/36_39/55696600/print.jhtml) (last visited May 21, 2004).

- “Many have tried to ring the death knell for radio. I can assure you that local radio is here to stay and will not only endure but prevail.”<sup>39</sup>

Furthermore, the past nine years have seen major transformations in the radio industry, leaving it in a far stronger position than the NAB Petition suggests. NAB repeatedly has emphasized terrestrial radio’s reversal of fortune since passage of the 1996 Telecommunications Act:

- “Today, the industry has rebounded financially but, just ten years ago, sixty percent of stations were losing money.... NAB believes the limits implemented through the 1996 Telecommunications Act ... strengthen[ed] the industry economically.”<sup>40</sup>
- As a result of the Telecommunications Act of 1996, “[r]adio today is more financially stable.”<sup>41</sup>
- The Telecommunications Act gave radio the tools it needed to compete with all other information providers, and “radio continues to prosper in the face of new competitors.”<sup>42</sup>

The Commission need look no further than NAB’s own statements to conclude that terrestrial radio is stronger than ever, and undeserving of special protections from marketplace competition.

Terrestrial radio also retains significant financial advantages over satellite radio. For example, terrestrial radio stations receive spectrum and music rights free of charge. By contrast, satellite DARS licensees spent billions of dollars purchasing spectrum, launching satellites, and

---

<sup>39</sup> NAB, *Opening Remarks of Edward O. Fritts on The 2002 NAB Radio Show*, Sept. 13, 2002, at <http://www.nab.org/Newsroom/PressRel/Speeches/0902.htm> (last visited Apr. 27, 2004).

<sup>40</sup> *Testimony Edward O. Fritts President & CEO National Association of Broadcasters Before The Senate Commerce Committee* (Jan.30, 2003) at <http://www.nab.org/Newsroom/PressRel/Testimonies/Testimony/013003.htm> (last visited May 21, 2004).

<sup>41</sup> *Testimony Edward O. Fritts President & CEO National Association of Broadcasters in front of Senate Commerce Committee*, Jan. 30, 2003, at <http://www.nab.org/Newsroom/PressRel/Testimonies/Testimony/013003.htm> (last visited May 21, 2004).

<sup>42</sup> *Written Testimony Edward O. Fritts President & CEO National Association of Broadcasters in front of Senate Commerce Committee* Jan. 30, 2003, at <http://www.nab.org/Newsroom/PressRel/testimonies/013003written.pdf> (last visited May 24, 2004).

licensing music. While terrestrial radio companies provide “free” programming and enjoy increased advertising revenue, Satellite Radio Licensees market an entirely new service carrying a monthly charge. Considering the size disparity, economic health, and favorable cost structure of terrestrial radio, traffic and weather alerts from satellite DARS pose no serious economic threat.

**D. The First Amendment Protects the Rights of Satellite Radio Licensees to Broadcast Traffic and Weather Alerts and the Rights of Listeners to Receive These Alerts.**

The First Amendment forbids governmental actions “abridging the freedom of speech,”<sup>43</sup> and thus protects satellite DARS traffic and weather alerts. When a licensee “exercise[s] editorial discretion in the selection and presentation of its programming,” even where that programming involves the speech of third parties, the licensee engages in protected speech.<sup>44</sup> Lawful restrictions on the content of this speech “must be narrowly tailored to promote a compelling Government interest.”<sup>45</sup>

Satellite Radio Licensees exercise editorial discretion in compiling and transmitting selected traffic and weather reports. Simply put, banning these reports, as NAB requests, would be unlawful censorship.<sup>46</sup> Moreover, NAB’s requested relief is anything but “narrowly tailored.” Further, NAB has not proffered—nor could it—any compelling state interest. Rather, grant of

---

<sup>43</sup> U.S. CONST. amend. I.

<sup>44</sup> *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

<sup>45</sup> *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

<sup>46</sup> *See* 47 U.S.C. § 326 (Supp. IV 2004) (“Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”).

the NAB Petition would serve only the *private, pecuniary interests* of current licensees.

Granting the NAB Petition would, therefore, trample the First Amendment rights of the Satellite DARS Licensees.

Moreover, NAB's request would impair the public's right to *receive* traffic and weather information:

[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.<sup>47</sup>

Again, NAB fails even to *hint* of any compelling state interest in curtailing the First Amendment rights of the listening public.

The Commission cannot "countenance monopolization of that market, whether it be by the Government itself or a private licensee."<sup>48</sup> Ignoring these principles, the NAB Petition would create an entitlement for local broadcasters, in derogation of the rights and interests of satellite DARS providers or listeners. Indeed, the NAB Petition urges exactly what the First Amendment forbids: granting exclusive control over speech to a subset of potential speakers. Because prohibiting satellite DARS traffic and weather alerts would violate the First Amendment, the FCC should dismiss or deny NAB's Petition.<sup>49</sup>

---

<sup>47</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>48</sup> *Id.*

<sup>49</sup> Prohibiting the Satellite Radio Licensees from broadcasting traffic and weather alerts also would constitute a taking, lawful under the Fifth Amendment only when combined with just compensation. Regulations that limit the use of property, even if not eliminating all economically beneficial use, may be a taking, depending on the regulation's economic effect on the property owner, the extent to which the regulation interferes with "reasonable investment-backed expectations," and "the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). A ban on traffic and weather reports would adversely affect Sirius and XM offerings, reducing the market of interested customers. Furthermore, Sirius and XM



**E. Modifying Satellite DARS Licenses Requires a Section 316 Hearing.**

Even if the Commission were to find traffic and weather alerts contrary to the public interest, prohibiting particular satellite DARS programming can be accomplished only after a hearing. Section 316 of the Communications Act gives the Commission the power to modify any license, but provides:

No such order shall become final until the holder of the license ... shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity ... to protest such proposed order of modification.<sup>50</sup>

Furthermore, in such a proceeding the Commission bears “both the burden of proceeding with the introduction of evidence and the burden of proof.”<sup>51</sup>

The instant proceeding does not, and could not, qualify as a Section 316 hearing. NAB’s filing requests a declaratory ruling, with an appropriate caption, now processed by the Mass Media Bureau. Though NAB urges the Commission to prohibit Satellite Radio Licensees from providing traffic and weather alerts, its Petition does not even mention the Sirius or XM licenses. Each such license is associated with a call sign and particular file numbers<sup>52</sup>—but NAB’s filing references neither. Even were NAB’s request lawful or wise—and it is neither—this docket could not modify either satellite DARS license. Were it inclined to agree with NAB, the

---

have invested heavily in satellite DARS, and traffic and weather reports are, as explained in Section III.A, reasonable expectations of radio service.

<sup>50</sup> 47 U.S.C. § 316(a)(1) (Supp. IV 2004).

<sup>51</sup> 47 U.S.C. § 316(b) (Supp. IV 2004).

<sup>52</sup> The call signs associated with Sirius’ satellites are S2105 and S2106; the file numbers are SAT-LOA 19900518-00036, SAT-LOA-19900518-00037, and SAT-MOD-19981211-00099. XM’s call signs are S2118 (XM-1) and S2119 (XM-2); the file numbers are SAT-MOD-20000131-00052 and SAT-MOD-20000131-00051. XM plans to launch replacement satellites with the call numbers S2616 and S2617 and file numbers SAT-RPL-20040212-00018 and 20040212-00019.

Commission would be required to reopen the license adjudications, provide sufficient notice, and permit fair opportunity to be heard.

Moreover, as detailed above, petitions for declaratory ruling are entirely within the FCC's discretion. Plainly, therefore, the instant proceeding employs legal standards and burdens of proof entirely inconsistent with license modifications, and thus is an inappropriate forum for such an action. Because NAB's request is not the required hearing under section 316 of the Communications Act, the FCC should dismiss the Petition.

#### **IV. CONCLUSION**

The traffic and weather alerts transmitted by XM and Sirius keep listeners safe and informed. Such offerings manifestly serve the public interest, thereby effectuating "the larger and more effective use of radio." NAB's request for Declaratory Ruling fails to evoke any uncertainty or controversy on this issue, and thus provides insufficient legal basis for a "declaration" or "ruling." Rather, the relief NAB requests would be unconstitutional, unsupported, contradicted by NAB's own testimony, anticompetitive, and unavailable in this forum.<sup>53</sup>

Once again NAB asks this Commission to preclude services providing substantial public benefit, a position the Court of Appeals for the D.C. Circuit disparaged as "luddite" twenty years earlier.<sup>54</sup> Yet, just over a year ago, NAB's President informed Congress: "[W]hat's good for our listeners is good for our industry."<sup>55</sup> What's good for listeners is clear—more than 23,000

---

<sup>53</sup> In fact, in relying on decade-old data previously rejected by the FCC, NAB appears to have filed its Petition without the slightest expectation of success.

<sup>54</sup> *Nat'l Ass'n of Broadcasters*, 740 F.2d at 1197.

<sup>55</sup> *Testimony Edward O. Fritts President & CEO National Association of Broadcasters in front of Senate Commerce Committee*, Jan. 30, 2003, at

Americans have filed in support of satellite DARS traffic and weather alerts. The Satellite Radio Licensees suggest the FCC follow NAB's own advice—and dismiss the instant petition.

Respectfully submitted,

**Sirius Satellite Radio Inc.**

/s/ Patrick L. Donnelly  
Patrick L. Donnelly  
Executive Vice President, General Counsel  
and Secretary  
Sirius Satellite Radio Inc.  
1221 Avenue of the Americas  
New York, NY 10020  
(212) 584-5100

**XM Radio Inc.**

/s/ Lon Levin  
Lon Levin  
Senior Vice President, Regulatory  
XM Radio Inc.  
1500 Eckington Place, NE  
Washington, DC 20002  
(202) 380-4000

June 4, 2004